

THE MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Cum-18-445

CHRISTINA WENTWORTH, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF CAROL A. KENNELLY
Appellee,

v.

MID COAST HOSPITAL
Appellant.

ON APPEAL FROM

SUPERIOR COURT (CUMBERLAND)

REPLY BRIEF FOR APPELLANT MID COAST HOSPITAL

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STATEMENT OF THE ISSUES IN REPLY

1. Has this Court already ruled on the justiciability of the appeal?
2. Has this Court already ruled that it will not consider Dr. Marietta's consent agreement with the State of Maine Board of Licensure in Medicine?
3. Must Mid Coast produce certain proof of potential patient identification?
4. Are nonparty patient records relevant to Mid Coast's defense that the standard of care was met?

ARGUMENT IN REPLY

The plaintiff's¹ brief attempts to relitigate multiple issues already decided by this Court, and those issues are taken up first in this reply. Then, Mid Coast replies to the plaintiff's argument that Mid Coast is required to produce some proof of the potential for patient identification on release of nonparty patient records, and her assertion that nonparty patients' medical records are relevant to Mid Coast's defense that the standard of care was met.²

¹ As noted by counsel for appellee, Christina Wentworth has been appointed Personal Representative of the Estate of Carol Kennelly, whose substitution has been approved. For ease and general consistency, however, Mid Coast uses "plaintiff" to refer to Carol Kennelly, the original plaintiff and appellee in this matter.

² Mid Coast also notes that the portion of the discovery order related to Dr. Marietta's training and CME materials only contained in Mid Coast's credentialing file is no longer at issue on appeal. On February 8, 2019, before the plaintiff filed her brief, Mid Coast informed the plaintiff via email and filed a letter with this Court indicating that it was waiving its appeal on that particular issue and that it would produce the requested discovery. Also on February 8, 2019, and also before the plaintiff filed her brief, Mid Coast produced the material that was subject to that portion of the discovery order. Curiously, the plaintiff still addressed this issue in her brief. Regardless, consistent with what Mid Coast communicated to the plaintiff and to the Court, the portion of Mid Coast's brief identified as Issue 3 and the portion of the plaintiff's brief identified as Issue IV are not being pursued in this appeal.

1. This Court has already ruled on the justiciability of the appeal.

As Mid Coast stated in its initial brief (Blue Br. 7), this Court (Humphrey, J.) unequivocally denied the plaintiff's motion to dismiss this appeal as interlocutory. (Order on Motion to Dismiss Appeal p. 1 ("The motion is DENIED.")) Further, on January 3, 2019, this Court (Saufley, C.J.) reaffirmed that order. (Order Denying Motion for Leave to Reply to Opposition to Motion to Dismiss ("The Court's denial of Kennelly's motion to dismiss stands.")) This Court ruled on the issue of justiciability with an unequivocal denial of the plaintiff's motion, and did not request further briefing or defer the matter for oral argument. For these reasons, Mid Coast openly addressed these denials, and noted that Mid Coast therefore did not "address the justiciability of the appeal further in its brief." (Blue Br. 7.)

Mid Coast has already addressed plaintiff's assertion that the appeal is interlocutory in its response to plaintiff's motion to dismiss. Mid Coast submitted ten pages of argument in opposition to that motion, setting forth the reasons why both the collateral order exception and the death knell exception to the final judgment rule applied. (*See Appellant's Objection to Appellee's Motion to Dismiss Appeal* pp. 3-13.) In its opposition, Mid Coast asked this Court to deny the motion outright, or to give Mid Coast the opportunity to address the issue with the merits of the appeal if this Court were not inclined to simply deny the motion. (*See Appellant's Objection to Appellee's Motion to Dismiss Appeal* pp. 14-15.) This Court

unequivocally denied the motion, and Mid Coast did not brief the issue further, viewing the issue as decided and being mindful of this Court’s resources.

Not only does the plaintiff attempt to reargue the issue in her brief, but she bafflingly argues that Mid Coast cannot reply to her arguments because of its alleged failure to re-brief this decided issue in its blue brief. The Law Court case she cites in support of her position is a footnote of *Holland v. Sebunya*, which addressed an appellant who did not “mention an issue in the brief or at argument,” and therefore failed to preserve that issue. 2000 ME 160, ¶ 9 n.6, 759 A.2d 205. The plaintiff’s position that this footnote supports her argument that Mid Coast failed to address the justiciability of this interlocutory appeal and is barred from doing so is highly disingenuous, where Mid Coast already submitted ten pages of legal argument on this issue to this Court, and this Court rendered a decision and did not request further argument or reserve decision on the issue.

Further, the plaintiff’s odd assertion is inapposite to the very purpose of a reply brief. The Maine Rules of Appellate Procedure provide that “[a]ny reply brief filed by the appellant must be strictly confined to replying to new facts asserted or arguments raised in the brief of the appellee.” M.R. App. P. 7A(c). Were this Court to determine that it will again consider the issue of justiciability of the appeal, Mid Coast is permitted to respond in its reply to a new argument made in the appellee’s brief. Mid Coast’s position is that this is not a new argument—it is a dead

horse that the plaintiff feels compelled to beat. Out of an abundance caution, however, where the plaintiff has again raised the issue of justiciability, and it was not argued in Mid Coast’s blue brief, Mid Coast appropriately responds in its reply.

The plaintiff’s brief reargues her motion to dismiss. Her arguments and other points of law can be summarized as follows, with citations to where she made the argument in her motion to dismiss, and where she repeated her argument in her red brief.³

Summary of the plaintiff’s argument or point of law	Red Brief page no.	Motion to Dismiss page no.
Final judgment rule	8	3-4
Failure to dismiss appeal opens the floodgates	9	2
Federal cases are instructive	9	2
Collateral order exception does not apply	9-12	4-8
Look to categories of cases, not particular injustices	10	5
No irreparable harm in producing the documents	10	5
Reliance on <i>Cohen</i> , <i>Mohawk Industries</i> , <i>Mercy Hospital Evidence</i>	10	5
Analysis of <i>Mohawk Industries</i>	11	5-6
<i>Mohawk Industries</i> applies to patient records	11-12	5-7
Analysis of <i>Mercy Hospital Evidence</i>	11	7
Death knell exception does not apply	13-14	8-9
Exception requires permanent foreclosure of relief if no appeal	13	9
Appeal must affect survival of basic cause of action	13	9
No permanent foreclosure of relief and nothing mooted by final judgment	14	9

³ This does not include arguments from the motion to dismiss that the plaintiff did not repeat in her brief, including her argument that this Court lacks “jurisdiction” over the appeal. (Appellee’s Mot. to Dis. p. 3.)

Mid Coast responded to each of the plaintiff's arguments in its opposition to the motion to dismiss, and, out of respect for the Court's Orders, will not repeat those arguments here. (Appellant's Objection to Appellee's Motion to Dismiss Appeal pp. 3-13; *see especially* pp. 7-11.)

In her brief, the plaintiff adds to her collateral order argument and asserts that so long as there is a party with standing and an incentive to appeal the final judgment, this Court is bound to apply the reasoning of *Mohawk Industries* to the nonparty patient medical records at issue in this case. (Red Br. 12.) Despite this sweeping statement, there is no support for her argument that standing and incentive to appeal usurp the very rule of the collateral order exception to the final judgment rule. Instead, when a party can demonstrate the elements of the collateral order exception are met—"a final determination of a claim separable from and collateral to the gravamen of the lawsuit," presenting "a major and unsettled question of law" with an irreparable loss of rights claimed "if resolution of the issue is postponed until appeal from the final judgment"—this Court may hear an otherwise interlocutory appeal. *Hanley v. Evans*, 443 A.2d 65, 66 (Me. 1982). For the reasons Mid Coast argued in its opposition to the plaintiff's motion to dismiss the appeal, the nonparty

patient records at issue in this case are unlike the attorney-client records⁴ at issue in *Mohawk Industries*, and the collateral order exception is met.

In sum, this Court already decided that the appeal is justiciable, and to the extent that this Court may revisit that conclusion, Mid Coast has already provided its argument on the matter and appropriately responds to the new point raised by the plaintiff in her brief.

2. This Court has already ruled that it will not consider Dr. Marietta's consent agreement with the State of Maine Board of Licensure in Medicine.

In a motion dated December 21, 2018, the plaintiff moved this Court to expand the record on appeal to include, among other things, a consent agreement between Dr. Marietta and the State of Maine Board of Licensure in Medicine. (Appellee Carol A. Kennelly's Motion to Supplement the Record p. 2 ("Appellee moves this Court to supplement the record in this appeal to include the following . . . 5. Mia Marietta's Consent Agreement with the Board of Licensure in Medicine, October 31, 2018 . . .").) Mid Coast opposed the motion, and this Court

⁴ In a footnote in her brief, the plaintiff adds that she anticipates Mid Coast may argue that nonparty patient medical records are different from the attorney-client communications that were at issue in *Mohawk Industries* because disclosure of those records would erode patients' confidence in the privilege. (Red Br. 13 n.5.) Mid Coast's opposition to the motion to dismiss clearly sets forth its argument as to why the harm caused by improper disclosure of a nonparty patient's medical records will never be redressed by appeal after final judgment, unlike the harm caused by improper disclosure of attorney-client records. (Appellant's Objection to Appellee's Motion to Dismiss Appeal pp. 7-11.)

(Humphrey, J.) unequivocally denied the motion. (Order Denying Motion to Supplement Record.)

In spite of this, the plaintiff includes in her fact section repeated citation to the consent agreement. (Red Br. 3-4.) She does not reference the consent agreement in her argument (*see* Red Br. 8-39), and thus it is unknown what relevance she believes it has to the precise issues on appeal.

Frankly, Mid Coast considered moving to strike that portion of the plaintiff's brief, but declined such a course of action that would further perpetuate the burden placed on this Court on appeal. Instead, Mid Coast respectfully requests that this Court not consider that portion of the Appellee's brief that references evidence that was not before the Superior Court and that this Court already ruled would not be considered on appeal.⁵ As this Court stated in its order denying the plaintiff's motion to supplement the record, "the record on appeal must be limited to the materials considered by the trial court." (Order Denying Motion to Supplement Record (citing *Beane v. Me. Ins. Guar. Ass'n*, 2005 ME 104, ¶¶ 9-12, 880 A.2d 284).)

⁵ The plaintiff's multiple references to evidence outside of the trial court record are inappropriate and should not be considered on appeal. (*See* Red Br. 30 (citing evidence not before the Superior Court in response to Mid Coast's argument that the court had erred by failing to exercise its power under Rule 26(c) to protect Mid Coast from the administrative burden of complying with the plaintiff's discovery request); *see also* Plaintiff's Reply to Amicus Brief 3 (citing evidence not before the Superior Court in response to amici's argument that the Superior Court's decision was inconsistent with the doctor-patient privilege and privacy laws), 6 (citing evidence not before the Superior Court regarding the number of gallbladder removal surgeries that occur nationally), 8 (citing evidence not before the Superior Court in response to amici's argument that extension of the order will place an unreasonable burden upon hospitals).)

3. Mid Coast does not need to produce certain proof of potential patient identification.

The plaintiff argues that Mid Coast was required to produce some specific example or evidence from a particular nonparty patient's record to demonstrate how the discovery order could result in the production of identifiable, protected health care information. (Red Br. 19-22.)

Mid Coast need not produce specific examples of how a particular patient's identity might be discovered from what the plaintiff considers medical records that have been "de-identified" (a virtual impossibility in this day and age). Research has demonstrated the reality that so-called de-identified records can be *re-identified*. *E.g.* Chris Culnane et al., University of Melbourne, *Health Data in an Open World: A Report on Re-Identifying Patients in the MBS/PBS Dataset and the Implications for Future Releases of Australian Government Data* (Dec. 18, 2017) available at <https://arxiv.org/ftp/arxiv/papers/1712/1712.05627.pdf> (last visited Feb. 20, 2019) (noting that "[t]he de-identification methods were bound to fail, because they were trying to achieve two inconsistent aims: the protection of individual privacy and publication of detailed individual records"); *see also* Boris Lubarsky, *Re-Identification of "Anonymized" Data*, 1 GEO. L. TECH. REV. 202 (2017) available at <https://georgetownlawtechreview.org/re-identification-of-anonymized-data/GLTR-04-2017/> (last visited Feb. 22, 2019) ("There is no duty to report if data has been re-identified. There is no private cause of action for an individual seeking

redress for re-identified data, and no external way to verify if a private entity has privately de-identified ‘anonymized’ data exists. The theory that data scrubbed of personally identifying information cannot be re-identified has time and again been shown to no longer hold true.”).

In *Health Data in an Open World*, researchers from the University of Melbourne’s School of Computing and Information Systems demonstrated how “patients can . . . be re-identified, without decryption, by linking the unencrypted parts of the record with known information about the individual.” *Id.* at 1. The researchers noted that such linking to achieve re-identification is “straightforward for anyone with technical skills about the level of an undergraduate computing degree,” *id.* at 4, and further noted that researchers had reported being able to re-identify data “based on simply linking with online information,” *id.* at 5. Further, contrary to the plaintiff’s assertion in her brief (Red Br. 20), depending on the person and the information, obscuring the precise timeframe of a medical event may have no effect on the ability to re-identify the patient. *See id.* at 8. The researchers noted that their successes in re-identifying numerous patients “reflect the inherent statistical fact that a small number of ordinary points of information is often enough to identify a person.” *Id.* at 20.

Courts have also acknowledged the possibility that alleged de-identified medical records might be re-identified. *E.g. Northwestern Memorial Hospital v.*

Ashcroft, 362 F.3d 923, 929 (7th Cir. 2004). There, Judge Posner observed that patients might fear that “when their redacted records are made a part of the trial record . . . persons of their acquaintance, or skillful ‘Googlers,’ sifting the information contained in the medical records . . . will put two and two together.” *Id.* (citing *Parkson v. Central DuPage Hospital*, 435 N.E.2d 140, 144 (Ill. 1982)).

Although this topic could quite easily take on a “Brandeis Brief-like” quality, it bears noting that these references are only some of the many that abound regarding the ever-growing risks of re-identification with today’s advancing technology.

4. Nonparty patient records are not relevant to Mid Coast’s defense that the standard of care was met.

The plaintiff argues that she is entitled to the medical records of fifty (50) nonparty patients because “they are relevant to Mid Coast’s defense that Dr. Marietta met the standard of care.” (Red Br. 28.) Plaintiff then references, with no citation or supporting evidence in the record, the purported opinions of Mid Coast’s expert witness. Indeed, throughout her brief, the plaintiff purports to state the testimony of Mid Coast’s expert witness, both in her fact section and in her argument that the nonparty patient records are relevant to whether Dr. Marietta breached the standard of care while performing the plaintiff’s surgery. (Red Br. 2, 28-29.) The record is devoid of evidentiary support for these citations and assertions—the plaintiff did not submit any of the expert’s testimony in the trial court (*see* A. 27-41; *see also*, *generally*, trial court file), and this Court denied the motion to supplement the record

on appeal to include that testimony (*see* Order Denying Motion to Supplement Record). Plaintiff's attempt to circumvent the well-established law that prior statements or actions are not relevant if "they do not deal with or relate to the conduct in" the case at issue, and are therefore not "probative evidence of negligent treatment" of a plaintiff in a subsequent malpractice action should not be considered. *Jacob v. Kippax*, 2011 ME 1, ¶ 18, 10 A.3d 1159; *see also State v. Jordan*, 1997 ME 101, ¶ 7, 694 A.2d 929.

As Mid Coast argued in its initial brief, it was clear error for the trial court to determine that the nonparty patient records were relevant.⁶ (Blue Br. 11-14.) Contrary to the plaintiff's assertions, alleged testimony absent from the record cannot support the court's relevancy determination. *See Remick v. Martin*, 2014 ME 120, ¶ 7, 103 A.3d 552 ("Clear error exists and requires reversal of a finding if (1) there is no competent evidence in the record to support it, or (2) it is based on a clear misapprehension by the trial court of the meaning of the evidence, or (3) the force and effect of the evidence, taken as a total entity, rationally persuades to a certainty that the finding is so against the great preponderance of the believable evidence that it does not represent the truth and right of the case.")

⁶ The notes are irrelevant to whether Dr. Marietta met the standard of care while operating on the plaintiff. Further, even if operative notes from surgeries following the plaintiff's indicated a change in Dr. Marietta's technique, this still would not be admissible regarding whether she had met the standard of care in the plaintiff's case. *See* M.R. Evid. 407(a)(1) ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove . . . [n]egligence . . .").

CONCLUSION

For the reasons stated in Mid Coast's initial and reply briefs, Mid Coast respectfully requests that this Court vacate the discovery order as to the nonparty patient medical records and Dr. Marietta's personnel file and remand for further proceedings.

Dated at Portland, Maine this 26th day of February, 2019.

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CERTIFICATE OF SERVICE

I, Abigail C. Varga, Esq., attorney for the Appellant, hereby certify that I have, on this day, **delivered by electronic mail and by United States mail**, postage prepaid, a copy of the foregoing Brief for Appellant Mid Coast Hospital to:

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